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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 73.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

ON WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

It is respectfully submitted, in beginning this argument, that the questions in dispute were not Court questions but were jury questions. While the jury might have drawn the conclusions claimed by the appellant, yet they were not compelled to draw them, and this argument is respectfully submitted on the theory that the jury could have drawn other conclusions on the testimony, which are the conclusions making for liability.

POINT 1.

Negligence established against petitioner.

The testimony adduced by the respondent showed that the decedent was employed by the petitioner as a gen-

eral utility man in its grain elevator at Weehawken, New Jersey, which was used for interstate tran-shipment of grain. The decedent had been employed at this elevator for a period of thirty years and his general work consisted of sweeping up the floor of the elevator, but besides that he helped to set the trolleys which are chutes for putting the grain in the bins; that there were times when he would have to go down the bins and sweep them out when the grain got stuck therein (R., p. 5).

Prior to the accident, there was a company which was experimenting with cyanide gas in order to find a remedy to kill the boll weevil which was found in the grain. The petitioner in its brief (R., p. 11) states that Mr. Shanahan, its superintendent, had no authority to permit the experiment. But, the record shows that Mr. Shanahan testified that he was in complete charge of the elevator (R., p. 21). The petitioner did consent to the experiment through the man in charge of the elevator.

> "A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved of or forbade it."
>
> Singer Co. vs. Rahn, 132 U. S., 518.

The only testimony to this effect is the self-serving testimony of the superintendent (R., p. 31), but the fact remains that Shanahan was the superintendent and in complete charge of the grain elevator. On page 21 of the record, he was asked:

> "Q. What is your occupation? A. Superintendent of grain elevator.
>
> "Q. You was in complete charge of it? A. Yes, sir; of the elevator."

Yet, the petitioner did not put anyone on the stand to testify that no representative of the cyanide people had made application to the New York Central Railroad for a letter of authorization to conduct the test. It may have been that a letter of authorization had been granted to the experimenting people by the petitioner. It was a jury question, under all of these circumstances, as to whether or not the petitioner, through its superintendent, who was in complete charge of the grain warehouse, had authority to permit the experiment.

It is, therefore, idle to say that he did not have authority to allow the presence of the gas in the structure. The gas used in the experiment was very dangerous and meant instantaneous death, and the petitioner knew this (R., p. 29). Notwithstanding that this was very dangerous, yet no one in the elevator was provided with gas masks, nor were the tops of the bins sealed so that the gas could not get out (R., p. 24).

This poisonous gas resulted from a powder, that was put or deposited in the grain, coming in contact with the air and moisture contained in the grain (R., p. 24). On the morning of the accident, the decedent was sweeping the floor of the bin and about a half hour later his foreman heard a noise as if something was hitting and he looked down into the bin around which the decedent had been sweeping and saw his body lying at the bottom of the bin (R., p. 7).

The witness, Fitzpatrick, testified that he did not know how many covers bin #81, wherein the decedent's body was found, had or whether the covers were on or not on the morning of the accident. These covers are on the level with the floor (R., p. 21). This witness worked on the same floor with the decedent at practically the same work (R., p. 19).

There is no proof that the so-called covers were air tight and there was evidence in the case from which

the jury could find that they were not. See photo offered in evidence (R., p. 79).

When the doctor from the North Hudson Hospital arrived at the elevator, in response to an ambulance call, he went near the bin but the odor of the gas was so strong that he had to get away (R., p. 36). Then a West New York fireman came, Raymond Phelman, who donned a gas mask and with a rope around his body, he went into the bin where the deceased was lying and he got down about ten rungs when he signalled to be hoisted and he was pulled up because he felt headaches and dizzy and had to go to the window for five minutes to get air (R., pp. 48-49).

When they got the body of the deceased out of the bin, the doctor gave the cause of death as cyanide poisoning (R., p. 37). He also stated that the fireman had the same initial symptoms that one finds from cyanide gas poisoning (R., p. 37).

The petitioner, without warning the decedent in a proper manner, caused to be put in a bin around which the decedent was working and the top of which opened on the floor above which he was working, cyanide gas, an invisible poison, which could not be detected by sight or smell. This gas was in the bin for four days and in some way escaped to the floor on which the decedent was working and while he was sweeping the floor, either in adjusting the cover of the bin, which was not air tight, or in looking for the bag in the bin, or upon orders from upstairs to get the chute ready, was poisoned and fell into the bin.

Clearly, it was for the jury to say whether this conduct of the petitioner was negligent. You can hardly call such a death trap a safe place in which to work.

This Court in the case of Northern P. R. Co. vs. Peterson, 162 U. S., 346, said:

> "The master owes the duty to his servant to provide him a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged."

See also the following cases:

> U. S. vs. Ind. Com. Colo., 230 Pac., 634;
> McCabe Construction Co. vs. Wilson, 209 U. S., 275.

The jury could have found from the testimony that no warning whatever was given to decedent except, if the testimony is believed, to tell him to keep away from the bin as much as possible (R., p. 14), although the witness Fitzpatrick, who was on the floor and doing the same kind of work as the decedent, testified that he did not hear the foreman say anything to the decedent to keep away from the bin (R., p. 20), which the decedent could not do for four days while he was working on the floor. No details whatever were given him, neither was he told that cyanide gas was being used nor in any way put in a position to protect himself.

In the case of Clark vs. Public Service Electric Co., 86 N. J. L., 145, Chancellor Walker speaking for the Court of Errors and Appeals said:

> "The rule seems to be as stated in 38 Cyc., 1570, that a verdict will not be directed where the only person who could have contradicted the witness is dead."

It is, of course, admitted that negligence must be shown under the Federal Employers Liability Act, but there was evidence from which the jury could find negligence in the instant case. The jury could have found that the bin floor on which the decedent worked was 300

feet long and 130 feet wide; that bells were sounded from upstairs to get the chutes ready; that decedent was working in response to a bell; that there was cyanide gas in the grain warehouse and no matter what part of the grain warehouse, if it could escape and injure an employee, this made the warehouse an unsafe place in which the servant worked. The jury could very well find that he was within the scope of his employment while sweeping the floor that, during his work, it might be necessary to adjust the covers of the bin and in so doing, there was ample evidence to justify an inference that he had been overcome by this gas and fallen down the bin.

In the case of McLaughlin vs. Joseph Horne Co., 206 Federal, Circuit Court Judge McPherson, speaking for the Third Circuit on page 249, said:

> "And a conflict may exist among the witnesses, not only where facts are directly disputed, but also where it is uncertain what inferences should be drawn from the facts after these have been established. Inferences of fact are themselves facts, and ordinarily the jury must draw them and not the judge. Especially is this true when the inquiry has to do with the standard of ordinary care, care according to the circumstances, where no previously defined standard exists, and where our system of jurisprudence commits to the judgment of a jury the duty of determining the shifting rule for the particular case, and citing the cases of:
>
> Grand Trunk Ry. Co. vs. Ives, 144 U. S., 417;
> Texas R. R. Co. vs. Harvey, 228 U. S., 319;
> Slentz vs. Western Co., 180 Federal, 389."

See also:

> Western & Atlantic R. R. Co. vs. Hughes, Advanced Sheets of March 1st, 1929, page 268.

The evidence in this case did not leave the negligence of the petitioner in the realm of speculation, as the jury could have inferred negligence from all the circumstances of the case. The instant case was not like the cases cited by the petitioner in its brief.

In the case of McCombe vs. Public Service, 95 New Jersey Law, 187, there was nothing but the circumstances of the body of Saunders under the car.

In the Adriance case, 95 New Jersey Law, 185, nobody knows or could surmise from the evidence what happened.

In the case of Price vs. New York Central Railroad, 92 Law, 429, the citation being taken from the first trial of the Price case, there was no proof of any fact exclusive of presumption.

Nor is the instant case like that of Chicago Railroad Co. vs. Coogan, 271 U. S., 472, where the Supreme Court said:

> "A judgment for plaintiff in an action to recover damages for wrongful death cannot be sustained where the record leaves the question of defendant's negligence in the realm of speculation and conjecture."

The evidence in the instant case is not direct but circumstantial—the admitted presence of a poisonous gas; death by gas; finding of the body; condition of the bin with the tops unsealed; decedent working on the bin floor doing his accustomed work, etc. There could be no more evidence except the testimony of the man killed as he was alone at the time of the accident.

In the case of Austin vs. P. R. R. Co., 82 New Jersey Law, 416, the New Jersey Court of Errors and Appeals said:

> "All that is required is that the circumstances be so strong that a jury may properly, on the grounds

> of probability rather than of certainty, exclude an inference favorable to the defendant."

It is not necessary to have actual eye witnesses to allow the case to go to a jury, as the petitioner in its brief argues, but it is sufficient if there is enough of circumstantial evidence to connect the petitioner's negligence with the decedent's death.

In the case of State vs. Elliot, 94 New Jersey Law, 76, which was a case where the deceased was struck by a fast moving, high power, Packard car and the only identification of the defendant was made by witnesses who described a car similar to the defendant, which car had struck a human body and which "threw it in the air" and the left mud guard of the car was bent. The Supreme Court held that the jury might reasonably infer that it was the defendant's car which was the instrumentality which caused the homicide. The Court in this case on page 79 remarked:

> "The identification of the car and its driver, under the circumstances, was almost necessarily circumstantial, but the rule is indubitable that such testimony may present a case sufficiently cogent and connected to go to the jury and afford the basis for a verdict."

As long as the evidence adduced at the trial was sufficient for the jury to infer negligence on the part of the petitioner that is sufficient to sustain a verdict as it is not incumbent upon the respondent to demonstrate by actual eye witnesses as to how the accident happened.

This Court in the case of Myers vs. Pittsburgh Coal Co., 233 U. S., 184, said:

> "A verdict in favor of plaintiff in an action for death should not be set aside by an Appellate Court

for the lack of evidence to support it unless the testimony was such that no recovery could be had upon the facts shown in any view which could properly be taken of them."

The instant case is not like the case of Erie R. R. vs. Welch, 242 U. S., 303, where the servant was waiting to be directed, for the deceased in the case subjudice was actually at work in the warehouse when he met his death. He had not ended his employment because he was killed early in the morning.

There were weighers on the floor above who sounded a bell for the decedent to notify them whether the grain was to go into the chutes. The petitioner at the trial accounted for one weigher, but not for the other and it was not within the realm of speculation for the jury to find that there was a sounding of bells for the deceased to get the chute ready, for two of the covers were found off after the accident and that the deceased met his death while answering the call from one of the weighers.

There were four holes to be covered and it is necessary to take the spout hole cover off to put the spout on (R., p. 44). The jury could have found from the evidence that any one of the weighers could call the decedent to get the chutes ready (R., p. 44).

POINT 2.

Decedent engaged in Interstate Commerce.

The decedent was working in the general work of sweeping, cleaning the floor, adjusting the bins, etc., in a grain warehouse used by the petitioner as a common carrier of railroad as a means of shipping grain received from without New Jersey and shipping it outside of New Jersey. It was, therefore, an instrumentality of interstate commerce (R., p. 55).

"The buying of grain within a State for shipment to markets in other states constitutes interstate commerce, if followed by shipments into other States."

Shafer vs. Farmer's Grain Co., 268 U. S., 189.

"The business of buying grain in North Dakota, practically all of which is intended for shipment to, and sale at, terminal markets in other states, conformably to the usual and general course of business in the grain trade, is interstate commerce."

Lemke vs. Farmer's Grain Co., 258 U. S., 50.

"A person who is employed by a railroad company in maintaining the effectiveness of a part of the railroad's plant, which is used in both interstate and intrastate commerce, is entitled to maintain an action under the Federal Employers' Liability Act when injured while engagd in such employment."

Illanardo vs. Erie R. R., 103 New Jersey Law, 4; affirmed by Court of Errors and Appeals in 103 New Jersey Law, 698.

See also:

Grybowski vs. Erie R. R., 89 New Jersey Law, 361.

POINT 3.

Decedent's death not due to his own negligence.

The jury could find that decedent's work was that of general utility man on the floor—sweeper of the floor, attending the bin, etc.; and it was for the jury and not

for the Court to say how the gas escaped. If it escaped to the floor on which he was working and he attempted to adjust the covers and was poisoned and fell, or if he got a bell from above, and in the usual course of his work, went to the bin, or if someone other than the decedent improperly lifted the cover to see where the bag was that was stuck in the chute and gas escaped and he went towards the hole to see if the condition could be remedied to protect himself and other workers on the floor, all these things would be in the line of his general employment and it was a jury question as to whether he was outside his duties when he was poisoned.

There is no proof that the dead man went into the bin. In adjusting covers, he could have been so overcome by gas as to fall into the bin, as the gas was to stay in the bin seventy-two hours (R., p. 23), and the bin was not sealed at the top in which the gas was being used (R., p. 24).

The New Jersey Supreme Court in the case of Manziano vs. P. S., 92 L., 326, said:

> "In such an environment the natural presumption is that the deceased met death while engaged in his occupation. There was no evidence that between four and six o'clock in the morning he voluntarily entered the trench for any purpose incompatible with his duty; nor was there evidence that he was non compos or abnormal and unable to appreciate and realize the necessary incidents of the danger which surrounded him, and to guard against the manifest and inherent perils of which he was enjoined to warn the public. In the absence of proof to that effect, the theory of suicide must be eliminated from the case, for the rule seems to be settled that where a person is found dead, the presumptions are that his death was natural or accidental, unless the evidence

shows him to have been insane; that suicide will not be presumed, and that the fact of death in an unknown manner creates no such presumption (Germain vs. Brooklyn Life Insurance Co., 26 Hun, 604; 29 Cyc., 235, and cases cited).

Illustrations of the application in this jurisdiction, of deductive reasoning from circumstantial testimony, are presented in DeFazio vs. Goldschmidt Company, 87 N. J. L., 317; Bryant vs. Fissell, 84 Id., 72; Muzik vs. Erie Railroad Co., 85 Id., 129.

In two of the cases cited there was proof only of the death and of the dangerous environment of the deceased, which furnished presumptive or circumstantial testimony of the manner of death, by a logical process of rational induction, based upon human experience, from which the reasonable inference of the existence of the statutory requirements was deducible, i. e., that death arose out of and in the course of the employment."

The petitioner in its argument assumes that decedent had no right to be where he was when he was poisoned, but he was working on the floor where he was put to work and doing the things which he ought to do, viz., look after the floor and bins that opened on the floor, and it was a jury question as to what he was doing when he was poisoned and whether it was within the scope of his employment.

In the case of Phoenix Mutual Insurance Co. vs. Doster, 106 U. S., 31, the Court said:

"Where a case fairly depends upon the effect or weight of testimony, it is for the consideration and determination of the jury, and it should never be withdrawn from them, unless the testimony be of such conclusive character as to compel the court, in

> the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it."

It cannot be argued that the death of the decedent was due to his failure to obey orders as in the case of Unadilla Valley R. R. Co. vs. Caldine, decided by this Court, December 10th, 1928, and reported in Law Edition, December 15th, 1928, page 102, because the deceased in our case was actively at work in his place of employment doing the things that he was told to do when he was killed. To say that he voluntarily removed the covers for a purpose other than that of his employment is to go into the realm of speculation.

Here the respondent was dead and therefore was presumed to be free from negligence. This presumption, of course, is rebuttable, and it raised a factual question for the jury. See case of Erie R. R. vs. Lindquist, 27 Fed. (2nd) where Circuit Court Judge Wooley, speaking for the Third Circuit, on page 100, said:

> "In an action against railroad for death of fireman, the latter, being dead, is presumed free from negligence, though presumption is rebuttable."

To take the case away from the jury on the ground that it was established that the decedent was negligent, that his negligence was the sole cause of his death, would be to take away from the jury the right to consider this presumption.

The respondent respectfully contends that there was no evidence to support this conclusion that decedent was negligent and that it would be mere speculation, but if that assumption of the respondent is deemed untenable and it is found that there was evidence allowing the conclusion, still it was for the jury to weigh this evidence against the presumption aforesaid and determine whether that presumption had been rebutted.

All of the questions involved in this case are jury questions and not for the Court, and it is respectfully submitted that the matters were properly left for the jury to decide.

It is respectfully submitted that the judgment below should be affirmed.

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